FACULTY OF ADVOCATES

RESPONSE FROM THE FACULTY OF ADVOCATES

TO

THE SCOTTISH GOVERNMENT CONSULTATION PAPER ON THE NOT PROVEN VERDICT AND RELATED REFORMS

Question 1: Which of the following best reflects your view on how many verdicts should be available in criminal trials in Scotland?

Answer:

1. Faculty is of the view that Scotland should keep all three verdicts currently available.

2. We oppose the removal of the not proven verdict.

3. It is understood that in some quarters the not proven verdict is seen as a barrier to conviction. If this is so, then removing it is removing a safeguard and, in a system where a simple majority can result in conviction for the most serious of offences, including murder and rape, and where such a simple majority can result in a sentence of life imprisonment or the public opprobrium of being a convicted sex offender, such a safeguard is not only necessary, but also fundamental. It is noted that in the background accompanying this

consultation paper it is stated that "*Many other common law systems operate successfully with two verdicts without any obvious impact on the delivery of fair and effective justice*". What it does not point out, however, is that these other systems usually require a unanimous decision or a majority of 10-2, but only when directed by the judge that such a majority verdict can be taken. None of these other systems allows someone to be convicted on a simple majority. It should be remembered therefore that such statements are not comparing like for like.

4. It is for this very reason that Faculty considers that the not proven verdict cannot be removed in isolation. Were the not proven verdict to be abolished, it follows that any consequential change would be both profound and fundamental and would require to ensure, in the interests of a fair and equitable justice system, that the fine balance of fairness be protected and preserved.

5. Faculty considers that, in the event the not proven verdict was removed, it would be imperative to identify the changes in our criminal justice system that would be required to accommodate such a significant change without jeopardising reliable justice. A justification for the simple majority was the fact we had two verdicts of acquittal. It would appear to Faculty that, if one of the verdicts of acquittal were to be removed, it would not be tenable to keep a bare majority while at the same time having a fair and safe system of criminal justice. Faculty notes that Professors Chalmers and Leverick in their research accept that the not proven verdict is regarded as a safeguard.

6. Given the uniqueness of the Scottish jury system, with 15 jurors, three verdicts, and a simple majority to convict, Faculty considers that the not proven verdict cannot be scrapped in isolation without other fundamental changes being made to the jury system, particularly in relation to the size of any majority required for conviction.

7. Faculty notes the data published by the Scottish Government on 10th June 2021, under an FOI request, which indicated that not proven was the verdict returned least in all four years between 2016 and 2020 in solemn trials for all offences, and in sexual offences it was also the least returned verdict in the same period. The majority of solemn cases involving sexual offences in each of those four years resulted in conviction according to the Scottish Government data.

8. Faculty notes the dangers inherent in approaching this matter in a 'results based' manner. Faculty considers that major substantive changes to our system of criminal justice should not be embarked upon solely based upon unhappiness with the rate of convictions in certain types of cases. It should not be forgotten that in cases involving allegations of sexual offences juries are the only members of the public who hear all of the evidence, as the complainer's evidence is heard in private. No mock trial can properly reflect and replicate the events of a real trial particularly one lasting days and containing full and comprehensive speeches and legal directions from the trial judge. Faculty considers that our criminal justice system indeed, any fair and proper criminal justice system, should be driven by justice and results. It is the system and

process of justice that we must uphold. We should not try and control the results of trials that we entrust to juries to decide.

9. Faculty notes that our system involving fifteen jurors is unique. Our system involving three verdicts is also unique; it is so to reflect the fact that a simple majority of those fifteen jurors can result in someone being convicted of the most serious of crimes. It follows from this that one part of this system cannot be changed without making fundamental changes to the other.

Question 2: If Scotland changes to a two verdict system, which of the following should the two verdicts be?

Answer:

10. Proven and not proven.

11. The onus is on the Crown to prove its case, and it must lead sufficient credible and reliable evidence before the fact finder in an attempt to do so. There is no onus or requirement on an accused to prove his innocence. It is therefore appropriate that any verdict should reflect whether they have succeeded or failed to do so. As such, the verdicts available should reflect this and therefore the appropriate verdicts in a two verdict system would be proven and not proven.

12. These terms are perhaps not as emotive as guilty and not guilty, but they reflect the function of the jury. Faculty considers that these verdicts are entirely apt to

convey the critical and key decision a jury must make: has the Crown proved its case or not?

13. Faculty asserts that there is therefore a logical case for these verdicts. In addition, it assists in reinforcing that the onus is entirely on the Crown to prove its case and, in many sexual offence trials, particularly rape, this also includes proving that an offence has been committed in the first place. Faculty is concerned that this fact is often forgotten. For example, sexual intercourse in everyday life is not a crime. It only becomes one if it occurs without the other person's consent, or without a reasonable belief of that person's consent. Unlike other offences where the fact of whether a crime has been committed or not is more straightforward, and the issue is whether the accused committed that crime, that is often not the position in cases involving allegations of rape. The not proven verdict may therefore more accurately reflect the fact that the jury are not satisfied beyond a reasonable doubt that a crime has even been committed, and it may be for this reason, having regard to the statistics referred to in the consultation paper (25% compared to 5% in non-rape and attempted rape cases) that it is more often used in rape cases than in other cases. Nonetheless, Faculty notes that not proven is still the verdict returned least in rape cases, behind those of guilty and not guilty.

14. Faculty notes the following observation in Lord Bonomy's Review (2015):

> *12.19: The question arises whether the impersonal nature of the verdict, in that it relates to the charge rather than to the individual as the other two verdicts do,*

has a bearing on the choice of verdict. It should be noted, however, that in comparable jurisdictions (such as England and Wales) which have two verdicts, the conviction rate for rape is not markedly different.

Question 3: If Scotland keeps its three verdict system, how could the not proven verdict be defined, in order to help all people including jurors, complainers, accused and the public to better understand it?

Answer:

15. Not proven is a verdict of acquittal as is not guilty, and jurors are not given a definition of that verdict. Faculty considers there is no need for further definition. It can be given its simple ordinary meaning; indeed, the jury is already told that both not guilty and not proven are verdicts of acquittal.

16. Each jury is unique to a trial. We entrust them with our liberty and upholding justice. They will know what the verdict of not proven means to them in the particular circumstances of the trial over which they deliberate. Juries are discerning. Faculty often sees this in trials involving multiple offences, where all three verdicts may be returned in relation to separate charges on the same indictment. For hundreds of years, juries have chosen one verdict of acquittal over the other. They have each applied their own common understanding of not proven or not guilty. Faculty considers that our system works well in practice.

Question 4: Below are some situations where it has been suggested a jury might return a not proven verdict. How appropriate or inappropriate do you feel it is to return a not proven verdict for each of these reasons?

Answer:

- (where a jury believe a person is guilty but the evidence did not prove this beyond reasonable doubt)- **1 appropriate**
- (where the case has not been proved but they wish to communicate some doubt or misgivings about the accused)- **1 appropriate**
- (where the case has not been proved but they wish to communicate to complainers that they were believed)- **1 appropriate**
- (where the verdict is returned as a compromise between jurors)- **2 inappropriate**

Question 5: Do you believe that the not proven verdict acts as a safeguard that reduces the risk of wrongful conviction?

Answer:

17. Yes. Experience tells us that in rape cases in particular, the factual questions are often hard to determine. It is the experience of Faculty that cases of rape, and attempted rape, are the most frequent types of case to present a jury with heavily nuanced competing evidence from lay witnesses, often affected by alcohol or other substances, in situations where it is rare to have other eyewitnesses, or forensic evidence that speaks to existence or absence of consent. Faculty notes that this may make it difficult for juries to establish the

essential elements of the offence beyond a reasonable doubt. That may leave a jury unable to convict, but by no means assured about innocence (beyond that it is presumed).

18. This may be a reason why rape and attempted rape cases yield the verdict more frequently than other charge categories. It is the experience of Faculty that there are often more factually difficult questions in such cases than in any others. It may be that juries appreciate that and communicate it through this measured means of acquittal.

19. Faculty is concerned that, should the not proven verdict be removed, there is a potential danger of jurors wrongly convicting an accused person. Removing this verdict may force jurors who have not been convinced by what they have seen and heard into one of the two polar verdicts, where they feel uncomfortable with either but are left with no choice. To do so undermines the presumption of innocence and may turn the trial into an examination of the morals of the accused rather than whether the prosecution have proved their case beyond reasonable doubt.

20. Whilst many lawyers would translate every 'not proven' verdict into one of 'not guilty' in the event that such a verdict were removed, Faculty notes that there are those who consider that any such change would result in cases which may presently result in not proven verdicts ultimately returning guilty verdicts. While Faculty is not aware of the evidential basis for this belief, it is concerned that emotive cases may produce such a result, where jurors are

unwilling to pronounce innocence (as they may understand a not guilty verdict to be) and accordingly return a guilty verdict.

21. In our system, where eight votes out of fifteen for "guilty" will deliver simple majority verdict, just one juror yielding to this influence could deliver an unjustified guilty verdict and change the course of a citizen's life wrongly and forever. Every single wrongful conviction erodes public confidence in our system of justice.

22. Faculty considers that the not proven verdict may be a safety valve for jurors who have not reached the threshold for conviction but reject the impossibility of guilt. It is in practice now tied closely to our unusual system of majority verdicts. There may be cases which should not end in conviction, but where the removal of the safety valve could turn them into false and wrongful convictions, as jurors may find the polarity of 'not guilty' is repellent in the hard evidential landscape of rape and attempted rape cases.

Question 6: Do you believe that there is more stigma for those who are acquitted with a not proven verdict compared to those acquitted with a not guilty verdict?

Answer:

23. No. It is the experience of Faculty that the public understand what not proven means, and that the absence of a guilty verdict effectively communicates the jury's assessment of the case.

Question 7: Do you believe that the not proven verdict can cause particular trauma to victims of crime and their families?

Answer:

24. No. Faculty has some concerns with the use of the word 'victim' in this context. The not proven verdict is a verdict of acquittal. Faculty is concerned that the current consultation proceeds on an assumption that all who make an allegation of having suffered a criminal wrong were indeed the victim of such acts, regardless of what a jury may have decided. It would be unfortunate if the present consultation was based on an assumption which paid no regard to the presumption of innocence and automatically assumed that all those accused of crimes are in fact guilty.

25. Faculty notes that the not proven verdict is returned in a case where there should not be a conviction. That is made clear to juries. Juries have processed it and applied it for a very long time. It may be, then, that this question, properly understood, is asking whether a not proven verdict would cause particular trauma over a not guilty verdict.

    Given the existence of the presumption of innocence it is important to appreciate that a verdict of "not proven" or "not guilty" does not necessarily say anything about (for example) whether the jury thought a complainer, or any other witness was telling the truth or not. Such verdict does not amount to "an exoneration" of the accused. A jury may have many reasons to acquit. It will have received detailed legal directions from the judge or sheriff. Faculty

considers that complainers and witnesses should not draw any definitive conclusions from a verdict of acquittal, other than that the Crown have failed to prove their case to the requisite standard.

26. Faculty notes that any trauma caused by a particular verdict may come from a misunderstanding as to what that verdict means. Faculty is concerned that not enough time and effort is given over to allowing witnesses and complainers the best understanding of how and why justice is administered as it is. It might be that regular public communication from the senior judiciary aimed at educating the public in relation to their criminal justice system would be valuable. We have suggested more than once that we, as a professional body with experience and knowledge in the area to equal any other, would gladly commit to improve this situation if invited by any such group to do so. That is why Faculty supports Independent Legal Representation for complainers in sexual offence cases in the High Court.

Question 8: Which of the following best reflects your view on jury size in Scotland?

If Scotland changes to a two verdict system:

- **Jury size should stay at 15 jurors.**
- **Juries should change to 12 jurors.**
- **Juries should change to some other size.**

If you selected "some other size", please state how many people you think this should be.

Please give reasons for your answer including any other changes you feel would be required, such as the majority required for conviction or the minimum number of jurors required for the trial to continue.

Answer:

27. If Scotland changes to a two verdict system, then Faculty is of the view that the jury size should remain at 15 jurors. In that event, Faculty would suggest the introduction of an additional safeguard of a qualified majority of 12 in favour of a conviction.

Jury Size

28. Faculty considers that the abolition of the not proven verdict would not be, in itself, a basis for reducing the size of a jury in a criminal trial. As is noted on page 21 of the consultation document, Lord Bonomy's Post Corroboration Safeguards Review recommended that research should be undertaken to ensure any reforms made to the Scottish jury system, including the size of the jury, were made on an informed basis. Faculty considers that there remains a need for such research.

29. Faculty notes that there is continuing debate regarding the reliability of both the jury research carried out in England, with real jurors in real trials, and that carried out in Scotland, with mock jurors in mock trials. It is extremely important to note that the many of the findings of the respective research conflict with each other. As has been recognised throughout the consultation document, the research in Scotland was carried out using mock jurors and

mock trials and cannot therefore be said to reflect real life juries. The limitations of the Scottish Government research as outlined in the consultation document can be summarised as follows:

- Sample size.
- Findings based on mock jurors' responses to only two specific types of trial.
- The unknown impact of mock jurors knowing that they were not participating in real trials.

30. Faculty is of a view that proposing reform based on research that has such significant limitations would be rash. There is a real risk that such reform would have a detrimental impact on the overall administration of justice.

31. Faculty observes that a further limitation exists in the use of only finely balanced mock trials within the mock jury research. By definition, finely balanced trials are those that are on the cusp of meeting the necessary standard of proof. These are exactly the type of trials that, in the experience of Faculty, might well result in a not proven verdict. That may be the most appropriate verdict in that case. Faculty has concerns that the jury research does not tell us anything other than how mock juries behave in a very specific set of circumstances.

32. Faculty has further concerns regarding some of the findings from the Scottish Government jury research. On page 21 of the consultation document, it is

asserted that mock jurors in 15 person mock juries were less likely to change their minds on a verdict than mock jurors in 12 person mock juries. It is not clear to Faculty what is to be taken from this observation. It might be thought that mock jurors being cajoled or even bullied by others was more keenly felt by participants in a smaller group. The desire not to be a lone voice or part of a small minority may have led to mock jurors changing their minds. It might be that groups of 15 providing a greater degree of diversity also provide a greater degree of comfort for those with views that differ to many others in their group. Faculty considers that the research available at present does not sufficiently explore the relationship between the number of persons on a jury and the decision making process that juries undertake.

33. Faculty is also concerned by the suggestion, also on page 21 of the consultation document, that reducing the number of jurors on Scottish juries from 15 to 12 ***might*** lead to more jurors participating more fully in the deliberations. It is submitted that such an uncertain conclusion is no basis on which to reform such a fundamental part of the Scottish justice system.

34. On page 7 of the consultation document, it is noted that caution must be taken when generalising results from the mock jury research to real juries. Standing the limitations summarised above, Faculty suggests that should be *great caution.*

35. A jury is the most democratic body we have, and we are lucky that we have a larger jury than other jurisdictions, which better reflects our society. As was pointed out in the 2008 Scottish Government consultation "The Modern Scottish Jury in Criminal Trials", a jury of 15 is more likely to include a mix of gender, ethnicity, experience, and social awareness. That has never been truer than today, as our society becomes increasingly diverse.

36. It is noted, on page 8 of the consultation document, that nothing in the Scottish Government jury research should be taken to undermine confidence in individual verdicts. It follows that we remain confident in the verdicts that our juries deliver. Faculty considers that, unless there exists compelling evidence that juries get it wrong, great care must be taken in altering a system that ostensibly works.

Other Changes

37. If the not proven verdict is abolished, Faculty proposes the introduction of the need for qualified majority of 12 in favour of guilt for a conviction to follow. This would act as an additional safeguard against miscarriages of justice and better reflects the burden of proof on the Crown to prove their case beyond reasonable doubt.

38. In the event of a reduction of the jury size to 12, Faculty proposes the need for a qualified majority of 10 for a conviction to follow. Again, this would act as an additional safeguard against miscarriages of justice and better reflects the burden of proof on the Crown to prove their case beyond reasonable doubt.

39. Whatever majority is settled upon, if a jury cannot reach such a majority, that should be the end of the matter and an acquittal should follow. Otherwise, there would exist the possibility of an endless series of retrials.

40. Faculty supports further research considering all aspects of the jury system together.

Question 9: Which of the following best reflects your view on the majority required for a jury to return a verdict in Scotland?

If Scotland changes to a two verdict system:

- **We should continue to require juries to reach a "simple majority" decision (8 out of 15).**
- **We should change to require a "qualified majority" in which at least two thirds of jurors must agree (this would be 10 in a 15 person jury, or 8 in a jury of 12).**
- **We should reduce the jury size to 12 and require a "qualified majority" of 10 jurors for conviction as in the system in England and Wales.**
- **We should change to some other majority requirement.**

If you selected "some other majority requirement", please state what proportion of the jury you feel should have to agree to the decision.

Please give reasons for your answer including any other changes you consider would be required such as to the minimum number of jurors required for the trial to continue.

Answer:

41. Faculty notes that this question presents the system in England and Wales as requiring a qualified majority of 10 jurors in order for there to be a conviction. Faculty notes that in that jurisdiction, jurors must first try to reach a unanimous verdict before the possibility of a majority verdict arises. If Scotland changes to a two verdict system, Faculty proposes the introduction of the need for qualified majority of 12 out of 15 in favour of guilt for a conviction to follow. This would act as an additional safeguard against miscarriages of justice and better reflects the burden of proof on the Crown to prove their case beyond reasonable doubt.

Question 10: Do you agree that where the required majority was not reached for a guilty verdict the jury should be considered to have returned an acquittal?

Yes/No/Unsure

Answer:

42. Yes. The burden of proof is on the Crown. There is no obligation on an accused person to prove their innocence. If the Crown fail to satisfy the requisite number of jurors of an accused's guilt beyond reasonable doubt, then they have failed to prove their case and an acquittal must follow. Faculty considers that any other approach would place a burden on the accused to persuade the jury of his innocence. Such a change would represent radical reform to the criminal law of Scotland. It would provide for a system which allowed hung juries. Such a system would lead to uncertainty for accused persons, complainers, and witnesses, together with significant expense to the public purse.

Question 11: Which of the following best reflects your view on what should happen with the corroboration rule in the following situations?

a. If Scotland remains a three verdict system and keeps the simple majority:

- **Scotland should abolish the corroboration rule.**
- **Scotland should reform the corroboration rule.**
- **Scotland should keep the corroboration rule as it is currently.**

Please give reasons for your answer.

b. If Scotland changes to a two verdict system and keeps the simple majority:

- **Scotland should abolish the corroboration rule.**
- **Scotland should reform the corroboration rule.**

- **Scotland should keep the corroboration rule as it is currently.**

  Please give reasons for your answer.

c. If Scotland changes to a two verdict system and increases the jury majority:

- **Scotland should abolish the corroboration rule.**
- **Scotland should reform the corroboration rule.**
- **Scotland should keep the corroboration rule as it is currently.**

  Please give reasons for your answer.

Answer:

43. Faculty recalls the extensive consideration given between 2011 and 2015 specifically to the abolition of the rule requiring corroboration in any criminal trial of the two essential facts, namely that the crime was committed, and that the accused was the person who committed the crime. This current consultation follows upon Jury Research commissioned by the Scottish Government and published in October 2019. As the current consultation document recognises, the corroboration rule was not specifically considered in that research but there was a series of subsequent "engagement events" at which there was very limited support for its abolition and a view that its removal, either as a standalone reform or linked to the introduction of a two-verdict system, was undesirable. This remains the view of Faculty.

44. The rule requiring corroboration of the essential facts in the overwhelming majority of criminal trials has long been recognised as a safeguard protecting

against miscarriages of justice. Faculty recognises that other organisations may see the rule as a barrier to the bringing of prosecutions and to convictions, particularly in the areas of domestic violence and sexual offences. Faculty fully appreciates those strongly-held views. There can be no dispute that the fundamental rules of evidence in a criminal trial must properly recognise the interests of the whole of society. If the balance is tilted too far in favour of a section of society, that imbalance must properly be addressed. It is the position of Faculty that the balance is evenly struck by the current evidential position.

45. The Consultation document refers in some detail to the changes that have been made most recently both in legislation and by the decisions of the Appeal Court. These are highlighted in Annex C, as rules which have been developed to broaden the scope of what can now be considered as corroborating evidence in cases of the type mentioned above, namely domestic violence and sexual offences. Faculty notes that the law of evidence is constantly developing and being refined in significant ways.

46. Faculty notes that some equation has been drawn in the consultation document with other common law systems, notably England and Wales, where the rule requiring corroboration is absent. Were the rule in Scotland to be removed, there would undoubtedly require to evolve a rule or direction similar to that given to juries in England, which requires the judge to direct the jury of the "special need for caution" in proceedings where the evidence of a single witness is uncorroborated. That direction is prevalent in cases of identification or confession, where a prosecution is dependent upon the testimony of a single

witness. It has long-standing recognition from the Police and Criminal Evidence Act 1984. It extends to any case in which the fundamental aspects of a prosecution are spoken to by a single witness.

47. Equally, the trial judge in England has the ability to remove from a jury's consideration any case in which the judge considers that no reasonable jury properly directed could convict upon the prosecution evidence adduced. No such provision in Scotland allows the first instance judge to take a qualitative decision regarding the evidence led by the prosecution, although the appellate court may take such a view when considering whether there has been a miscarriage of justice. Although it is said to be a provision which requires to be used sparingly, it is another example of the "safeguards" within different systems which protect against miscarriages of justice.

48. In response to Question 11, there are three different premises upon which the "corroboration rule" is to be assessed. They are, that a three verdict system is retained with a simple majority, that a two verdict system is adopted with a simple majority, and that a two verdict system is adopted with an increased numerical majority.

49. In each case it is the view of Faculty that any change in the number of available verdicts and the numerical majority of such verdicts should have no bearing upon the application of the "corroboration rule".

Question 12: If the corroboration rule was to be reformed, rather than abolished, what changes do you feel would be necessary?

50. No new case has been made for the abolition of the corroboration rule, or its reform, either in the extensive research between 2011 and 2015 or in the research and consultation which has followed to date. Faculty considers that there has been nothing to undermine the premise that in the current system it acts as a safeguard. As has been noted, the law of corroboration has been and continues to develop in a way which has recognised the changes in society without removing the basic legal foundation.

Question 13: Do you feel further safeguards against wrongful conviction should be in place before any reform or abolition of the corroboration rule? Yes/No

Please give reasons for your answer, including what other safeguards you believe would be appropriate and why:

Answer:

Preamble

51. Before addressing the substantive question, Faculty considers that it may be helpful to rehearse what exactly the corroboration rule means in Scotland. Faculty notes that some may misunderstand the position and think that every element of a case requires to have corroborative evidence. [1] This has never been

[1] Justice Committee 3 December 2013 column 3866 *et seq*.

the case. Such a misapprehension may have its roots in Hume's commentary on the matter:-

"No one shall in any case be convicted on the testimony of a single witness. No matter how trivial the offence, and how high soever the credit and character of the witness, still our law is averse to rely on his single word, in any inquiry which may affect the person, liberty, or fame of his neighbour ; and rather than run the risk of such an error, a risk which does not hold when there is a concurrence of testimonies, it is willing that the guilty should escape." [2]

52. Such an interpretation may disregard Hume's qualification:-

" It would not however be a reasonable thing, nor is it our law, that the want of a second witness to the fact cannot be supplied by the other circumstances of the case. If one man swear that he saw the pannel stab the deceased, and others confirm his testimony with circumstances, such as the pannel's sudden flight from the spot, the blood on his clothes, the bloody instrument found in his possession, his confession on being taken, or the like ; certainly these are as good, nay better even than a second testimony to the act of stabbing. Neither is it to be understood in cases of circumstantial evidence, either such as the foregoing case, or one where all the evidence is circumstantial, that two witnesses are necessary to establish each particular; because the aptitude and coherence of the

[2] Baron Hume in his Commentaries on the Law of Scotland respecting Crimes; Vol. ii, p. 383.

several circumstances often as fully confirm the truth of the story, as if all the witnesses were deponing to the same facts." [3]

53. Faculty considers that the modern *dictum* in respect of corroboration is that expressed in *Fox v HMA.* [4] *Fox* also considers the meaning of circumstantial evidence that supports an account indicative of a crime having been committed and the accused being responsible. It is defined thus:-

"it is of the very nature of circumstantial evidence that it may be open to more than one interpretation and that it is precisely the role of the jury to decide which interpretation to adopt. If the jury choose an interpretation which fits with the direct evidence, then in their view - which is the one that matters - the circumstantial evidence confirms or supports the direct evidence so that the requirements of legal proof are met. If on the other hand they choose a different interpretation, which does not fit with the direct evidence, the circumstantial evidence will not confirm or support the direct evidence and the jury will conclude that the Crown have not proved their case to the required standard." [5]

54. In reality, very little is required to support direct evidence, or indeed primary circumstantial evidence, to meet the legal test. In essence, the "*consistent with*" test is not so much a legal burden to be addressed by the Crown, but a very easily addressed safeguard against wrongful conviction. Faculty is therefore of

[3] *ditto* p. 384
[4] 1998 SCCR 115
[5] At page 126 F

the view that, if this basic universal safeguard is to be removed, there must be other protections afforded against wrongful conviction.

55. In short, the answer to the substantive question is "Yes."

Areas to be Addressed by Additional Safeguards

56. Safeguards ought to be in place to protect against the following:-

- Unreliable evidence of visual identification;
- Unreliable or coerced confessions;
- Confirmation bias in evidence;
- Inaccurate or unsubstantiated expert evidence;
- Perjured evidence, and
- Peculiarities of sexual assault and rape indictments.

57. Faculty notes that in the wake of the acquittals on appeal of the "Guildford Four," the Scottish concept of corroboration was hailed as a safeguard against any such miscarriage of justice in Scotland. Indeed in questions asked of H.M. Government in the House of Lords on 11 December 1989, Lord Mischom asked the following:-

"My Lords, does the Minister agree that when a Statement was made in this House on the critical situation which had arisen as a result of discoveries as to how the Guildford Four were wrongly convicted, there was a clear voice in this House calling for the reform mentioned in this Question? Will the Minister explain to the House why we have to wait until the inquiry chaired by Sir John May reports in 1991 as to what happened in that specific case of the Guildford Four? Why do we have to wait for that report in order to have precisely the same law as Scotland has so satisfactorily?" [6]

General Admonition to Jury

58. The first and primary protection in a system of criminal justice without corroboration ought to be a standard jury direction admonishing of the danger of relying on the unsupported account of a single witness. It is understood that this is the practice in England. Whilst this would leave open the option of conviction, it would stress to the jury the balance to be struck between that option and the obligation on the Crown to prove a case to the satisfaction of the jury without their enduring a reasonable doubt.

59. Depending on the nature of the uncorroborated evidence supporting a charge, there are a number of other directions that would offer safeguards.

[6] Hansard (House of Lords) 1989 vol 513 cc1123-4

Unreliable evidence of visual identification

60. The ability of individuals to accurately identify other individuals will vary according to various factors, such as opportunity to identify, the time available for identification, intoxication, the stress of events, the means of identification, a person's latent ability to make identifications, environmental conditions such as light and weather, distance and vantage point, and the circumstances of the event recalled.

61. Despite the expectation that The Supreme Court would opine definitively on dock identifications in *Macklin -v- HMA*,[7] no such binding opinion was forthcoming. In short, this still leaves open the reality that a witness can identify an accused person as the perpetrator of a crime or offence simply by looking around a courtroom, and selecting the sole individual sitting between two escorts in the dock of court. They may be the only person in court not sitting beyond the bar. This leaves open the possibility that misidentification might occur either by malice or by subconscious assumptions on the part of the witness. It seems incongruous to have the possibility of a single candidate for identification in Court, but guidelines being in force for identification in VIPER[8] parades assuming a minimum of 5 alternative stand-ins.

[7] 2016 SC (UKSC) 47
[8] Video Identification Parade Electronic Recording

62. It is submitted that if corroboration is to be abolished, uncorroborated evidence of identification should only be available if it comes from an identification parade that is constituted according to fixed rules, and subject to scrutiny by legal representatives.

Unreliable or Coerced Confessions

63. As unpalatable as it may seem to legislators, history records cases of false confessions being obtained by police officers. Dramatic examples include "The Birmingham Six" [9] and "The Guildford Four." [10] This suggests that there must be particular safeguards against uncorroborated confessions.

64. Additionally, it is well understood that the criminal justice system often encounters individuals who endure mental health issues. Equally, it is well understood that the reporting of serious crime often leads to false confessions being made to the police. Whilst the police generally have an ability to sift such attention seekers from an investigation, the two factors make for an uncomfortable combination, if simple confession evidence devoid of special knowledge could lead to conviction. It is submitted that such a source of

[9] sub. nom. R v McIlkenney (1991) 93 Cr.App.R. 287–318

[10] R. v. Maguire and others (1991) 94 Crim. App. R. 133

evidence should be excluded *per se* from leading to a conviction without corroboration of some description.

Confirmation Bias

65. Confirmation bias is the tendency to search for, interpret, favour, and recall information in a way that confirms or supports one's prior beliefs or values.[11] People display this bias when they select information that supports their views, ignoring contrary information, or when they interpret ambiguous evidence as supporting their existing attitudes. It can be seen even in expert evidence such as telephony analysis, where an analyst is responding to an intelligence based theory rather than an factually based theory. In essence they will find evidence in support of a proposition whilst subconsciously disregarding alternative reasoning. In appropriate cases, specific admonition ought to be given to the jury in relation to such evidence.

Inaccurate or Unsubstantiated Expert Evidence

66. The difficulty with unsubstantiated expert evidence is twofold. Often it is in an area of novelty where little research exists, and by its nature, can seem

[11] Nickerson, Raymond S. (1998), "Confirmation bias: A ubiquitous phenomenon in many guises", *Review of General Psychology*, 2 (2): 175–220,

impressive. The Cleveland Inquiry demonstrates the danger of such a situation, whereby 125 cases of medically diagnosed child abuse cases by two named doctors were negatively scrutinised.[12]

Perjured evidence

67. The legislature should not be naïve to the possibility that witnesses might perjure themselves. Occasionally witnesses might have an advantage in perjuring themselves. If that is a live issue, it will no doubt be the subject of cross-examination. However that does not sit well with the restrictions imposed by section 274 of the Criminal Procedure (Scotland) Act 1995. In general terms, the general admonition to the Jury suggested *supra* might suffice. It might not, however, suffice for sexual charges.

Peculiarities of Sexual Assault and Rape Indictments

68. Sexual assault and rape charges present unique difficulties. The reason is that such crimes have an *actus reus* that is not *per se* criminal. Proof of criminal intent is necessary. Proof of lack of consent is necessary.

[12] The Cleveland Report:by Judge Elizabeth Butler-Sloss 1st August 2011

69. From a Crown point of view, at present, they need to corroborate the complainer's evidence by some means. That might be corroborated by distress, ambiguous injury, or actions around the time of the libel.

70. There are many restrictions on the cross-examination of complainers in trials for sexual offences. Section 274[13] is referred to for its terms. If the need for corroboration of *mens rea* in sexual matters is withdrawn, on the basis that the act is not *per se* criminal, might the *quid pro quo* be that restrictions on cross examination might also be withdrawn? Same would allow any jury to consider the past sexual interactions between accused and complainer to assess the credibility and reliability of the complainer.

Jury Numbers

71. The test of criminal culpability is "beyond reasonable doubt." A jury is a singular word. The verdict is equally singular. Despite the test, an 8:7 verdict equates to a 53% verdict of guilty. It is queried if the dissenting 47% of such a jury can be anything other than the expression of a reasonable doubt of the jury as a whole singular entity. If a safeguard in the form of the corroboration rule is removed, restoration of such a safeguard might be in a qualified majority of the jury number that is demonstrable of excluding reasonable doubt.

[13] S.274 of The Criminal Procedure (Scotland) Act 1995

Generality

72. Beyond the submissions referred to above, the safeguards, so far unimplemented, of the Bonomy proposals[14] are commended.

Question 14: If the corroboration rule was kept or reformed, what else could be done to help people, including those involved in the justice system and the general public, to understand it better?

Answer:

73. The jury research forming the basis of the present consultation did not specifically consider the corroboration rule. However, the mock jurors were given standard directions on the meaning of corroboration and they appeared to understand this concept more readily than other legal concepts. Nonetheless, this research was not specific and therefore should be considered in that context.

[14] The Post-corroboration Safeguards Review Final Report April 2015

74. Recent developments have resulted in jurors being provided with directions prior to evidence being led during any trial. Directions are two fold: standard directions, and specific directions for the particular trial. The standard direction covers issues such as the standard of proof and corroboration. Specific directions include legal principles unique to the particular trial, such as corroboration by the doctrine of mutual corroboration. The standard and specific directions set out a framework within which the jurors must operate but, more importantly, provide a route-map for those without legal knowledge to understand the concept of corroboration along with potential sources of evidence which may provide corroboration. It is the experience of Faculty that this relatively novel approach works very well. Jurors are being given full and proper directions about the legal concept of corroboration in advance of any evidence being led. This is proving to be an excellent source of information, set out in plain and intelligible terms.

75. A further level of information regarding corroboration could be facilitated by the standard directions being forwarded with the jury citations. This information could also be available on the Scottish Courts website for the general public and others to consider.

Question 15: Considering the three needs of the public sector equality duty – to eliminate discrimination, advance equality of opportunity and to foster good relations, can you describe how any of the reforms considered in this paper could

have a particular impact on people with one or more of the protected characteristics listed in the Equality Act 2010 (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation)?

Answer:

Faculty does not consider that the proposals in this paper could have a **particular** impact on people with one or more of the protected characteristics referred to.

Question 16: Are there any other issues relating to equality which you wish to raise in relation to the reforms proposed in this paper?

Answer:

No.

Question 17: Do you feel that any of the reforms considered in this paper would have an impact on human rights?

Answer:

Yes. The proposals in this paper may have an impact on an accused person's right to a fair trial as contained in Article 6 of the European Convention on Human Rights.

Question 18: Do you feel that any of the reforms considered in this paper would have impacts on island communities, local government, or the environment?

Answer:

No.

FACULTY OF ADVOCATES

Question 19: Do you have any other comments about the content of this paper?

Answer:

No.

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